

Is ENDA the Answer?

Can a “Separate but Equal” Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?

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Some state and local governments have enacted anti-discrimination laws that protect gays and lesbians from discrimination in employment, but there is no federal legislation that currently addresses this issue. The Employment Non-Discrimination Act (ENDA) seeks to remedy this by extending federal anti-discrimination protection to gays and lesbians under a framework similar to that used in Title VII. This note argues that ENDA's protection to gays and lesbians will be less than the protection offered to other protected groups under Title VII for two reasons. First, ENDA includes numerous exceptions that narrow the scope of the prohibition on sexual orientation discrimination. Second, by addressing sexual orientation in a stand-alone statute, Congress encourages the courts to construe ENDA's scope more narrowly than that of Title VII and to refuse to extend interpretive theories developed under Title VII to sexual orientation discrimination.

I. INTRODUCTION

Discrimination on the basis of sexual orientation is common in the American workplace.¹ A recent public survey found that eighty-three percent of Americans believe that homosexuals and bisexuals should be protected from discrimination in employment.² In the 2000 presidential primary election, Democratic hopeful

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¹ Surveys have found that between sixteen percent and forty-six percent of gays, lesbians, and bisexuals have experienced some form of employment discrimination based on their sexual orientation. M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726, 728 (1995). Some forms of this discrimination include failure to hire, immediate termination, “glass ceiling” limits on promotions, harassment, and unequal benefits. David A. Landau, Note, *Employment Discrimination Against Lesbians and Gays: The Incomplete Legal Responses of the United States and the European Union*, 4 DUKE J. COMP. & INT’L L. 335, 338–40 (1994). The stakes for preventing such discrimination are high “because of the impact anti-gay discrimination has on the ability of lesbians and gay men to exercise yet other rights guaranteed to all Americans.” Samuel A. Marcossan, *The “Special Rights” Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J. L. ETHICS & PUB. POL’Y 137, 159 (1995).

² John Leland, *Shades of Gay*, NEWSWEEK, Mar. 20, 2000, at 46, 48. This figure is up from fifty-six percent in a 1977 survey. *Id.* Domestic partnership benefits are still controversial; fifty-eight percent think partners are entitled to health insurance, and fifty-four percent think partners are entitled to Social Security. *Id.* at 49.

Bill Bradley attracted considerable attention from the gay press when he announced that he thought the best way to protect sexual orientation was to add it to the categories protected by Title VII of the Civil Rights Act of 1964.³ In contrast to Bradley, his challenger, Vice-President Al Gore, supported the enactment of the Employment Non-Discrimination Act (ENDA).⁴ Both Democratic candidates purported to be seeking a federal answer to the continuing national problem of sexual orientation discrimination,⁵ but could not agree on the best policy. This note addresses the question of whether it is possible to adequately protect gay and lesbian employees from discrimination through a stand-alone statutory scheme like ENDA.

Part II of this note reviews the current law surrounding sexual orientation discrimination in employment. It looks at state and local anti-discrimination laws and why these laws are less effective than federal legislation would be. This Part also looks at the decisions of federal courts, which have refused to extend Title VII to sexual orientation, but have recently begun to find that gays and lesbians might be protected under the Equal Protection Clause of the Fourteenth Amendment. Part III then examines the specific protection offered under ENDA, as well as the numerous exceptions to ENDA. This Part then analyzes the possible court interpretations of ENDA, and suggests that the protection offered by ENDA will be far different and inferior to that of Title VII. This note concludes that ENDA's proposed "separate but equal" treatment of sexual orientation is far from equal to Title VII's protections.

II. CURRENT STATE OF THE LAW

A. *Anti-Discrimination Legislation*

1. *Local and Municipal Ordinances*

In 1972, East Lansing, Michigan, became the first jurisdiction to prohibit sexual orientation discrimination in employment.⁶ Over the last three decades, over 150 cities and 35 counties in the United States have joined East Lansing and enacted laws that to some extent prohibit discrimination in employment on the

³ Chris Bull, *Bill Bradley Wants You!*, ADVOCATE, Oct. 12, 1999, at 26, 31. The Civil Rights Act of 1964 is codified at 42 U.S.C. § 2000e-2 (1994).

⁴ See Bull, *supra* note 3 at 26, 31. Employment Non-Discrimination Act, S.1276, 106th Cong. (1999).

⁵ See Chuck Colbert, *Gays Poised as Key Voters in Presidential Race*, GRAND RAPIDS PRESS, Mar. 4, 2000, at A7 (noting the "shining path of support" to gay civil rights offered by both candidates).

⁶ See LYNNE YAMAGUCHI FLETCHER, *THE FIRST GAY POPE* 77 (1992).

basis of sexual orientation.⁷ As is to be expected, these ordinances vary greatly from jurisdiction to jurisdiction.⁸ This variance can cause problems, as it makes it difficult for employers who operate in more than one city to adopt uniform policies.⁹

When these ordinances have come under challenge, courts have not treated them uniformly. Some state courts have upheld and expressly approved of these local laws.¹⁰ Other courts have struck down local anti-discrimination ordinances as outside the legislative power of the municipality¹¹ or preempted by state law.¹² At least one court has held that a local ordinance is insufficient to support tort claims for wrongful discharge in violation of public policy.¹³ There is some evidence to suggest that the enforcement of these local ordinances is lacking.¹⁴

⁷ See LAMBDA LEGAL DEFENSE AND EDUCATION FUND, *Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=217> (Oct. 25, 1999) [hereinafter *Summary*] (on file with the Ohio State Law Journal).

⁸ Many counties and cities ban sexual orientation discrimination only in public employment; others extend protection to private employment and public accommodations. See *id.* Some local laws extend even further. See, e.g., SAN FRANCISCO, CAL. ADMIN. CODE Chap. 12B (1998) (barring the city from contracting with any companies that discriminate on the basis of sexual orientation).

⁹ See Chad A. Readler, Note, *Local Government Anti-Discrimination Laws: Do They Make a Difference?*, 31 U. MICH. J.L. REFORM 777, 790 (1998) ("Although local ordinances reflect the shared values of their communities, they have created a number of inconsistencies in enforcement from town to town and state to state, placing inconsistent demands upon employers with offices in more than one locality.").

¹⁰ See, e.g., *Air Transp. Ass'n of Am. v. San Francisco*, 992 F. Supp. 1149, 1159 (N.D. Calif. 1998) (holding that an ordinance which prohibited the city from contracting with companies that discriminated on the basis of sexual orientation with regard to benefits was a valid exercise of municipal power and was not preempted by state law); *Kahn v. Thompson*, 916 P.2d 1124, 1127, 1130 (Ariz. Ct. App. 1995) (upholding a ban on sexual orientation discrimination against a free association claim).

¹¹ See, e.g., *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 108 (Minn. Ct. App. 1995) (invalidating a city ordinance that granted health care benefits to same sex partners of city employees on the grounds that the issue of same-sex partner benefits was a statewide issue).

¹² See, e.g., *Delaney v. Superior Fast Freight*, 18 Cal. Rptr. 2d 33, 35-37 (Cal. Ct. App. 1993) (holding that a city ban on sexual orientation discrimination was preempted by a state ban on sexual orientation discrimination).

¹³ See *Greenwood v. Taft, Stettinius & Hollister*, 663 N.E.2d 1030, 1031-34 (Ohio Ct. App. 1995) (noting that a local ordinance prohibiting sexual orientation discrimination is not sufficiently clear public policy to establish tort of wrongful discharge). *But cf.* *Overholtzer v. W. Contra Costa Sch. Dist.*, No. A080225 (Cal. Ct. App. 1999) (holding that plaintiff, constructively discharged after coming out as a lesbian, who did not file administrative appeals required under state anti-discrimination law nevertheless established tort of wrongful discharge in violation of public policy).

¹⁴ See Readler, *supra* note 9, at 796-805 (suggesting that local ordinances prohibiting types of discrimination that are not covered under federal law are ineffective because claims are

One significant problem with local anti-discrimination laws is their political instability. For example, the anti-discrimination ordinances enacted in Cincinnati, Ohio,¹⁵ were later invalidated by Issue 3, a ballot initiative that forbade the city or any of its agencies from adopting any policy that offered anti-discrimination protection based on sexual orientation.¹⁶ Issue 3 was challenged on equal protection and First Amendment grounds,¹⁷ but the Sixth Circuit upheld it as constitutional in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*.¹⁸ The case was appealed to the Supreme Court, which vacated the decision and remanded,¹⁹ but the Sixth Circuit reaffirmed the constitutionality of Issue 3.²⁰ The Supreme Court refused to reconsider the case.²¹ As a practical

underreported, employers are unaware of the ordinances, and enforcement agencies are underfunded and underqualified to handle the claims they do receive).

¹⁵ See CINCINNATI CITY ORD. No. 79-1991 (1991) (prohibiting discrimination on the basis of sexual orientation in city employment and appointment to city boards and commissions); CINCINNATI CITY ORD. No. 490-1992 (1992) (prohibiting discrimination on the basis of sexual orientation in private employment, public accommodations, and housing).

¹⁶ See *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 264 (6th Cir. 1995), *vacated by* 518 U.S. 1001 (1996).

¹⁷ The district court found that gays, lesbians, and bisexuals met the criteria for quasi-suspect status. See *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 436 (S.D. Ohio 1994), *overruled by* *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), *vacated by* 518 U.S. 1001 (1996). The court found that Issue 3 implicated the fundamental right of access to the political process, and was not rationally related to any legitimate governmental purpose. See *Equal. Found.*, 860 F. Supp. at 432, 441. Issue 3 was also found to violate the First Amendment because it was unconstitutionally vague and infringed on the plaintiff's rights to speech, association, and petition. See *id.* at 447, 449.

¹⁸ See *Equal. Found.*, 54 F.3d at 270-271. The Sixth Circuit disagreed with the district court's decision on all grounds. It found first that homosexuals did not constitute a quasi-suspect class. *Equal. Found.*, 54 F.3d at 268. It then found that Issue 3 did not burden any fundamental right of homosexuals. *Id.* at 269. Finally, it held that no First Amendment rights were obstructed by Issue 3. *Id.* at 269-70.

¹⁹ See *Equal. Found.*, 518 U.S. at 1001. The Court remanded and vacated in consideration of *Romer v. Evans*, 517 U.S. 620 (1996). See *Equality Found.*, 518 U.S. at 1001. For a full discussion of *Romer v. Evans*, see *infra* notes 82-90 and accompanying text. Justice Scalia, joined by Justice Thomas, dissented from the order to vacate and remand, and suggested that Issue 3 was distinguishable from the state constitutional amendment struck down in *Romer* because it involved a decision by the "lowest electoral subunit." *Equality Found.*, 518 U.S. at 1001 (Scalia, J., dissenting).

²⁰ See *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 300-301 (6th Cir. 1997). The Sixth Circuit found that the Cincinnati ordinance was distinguishable from the state amendment at issue in *Romer* because it applied only at the municipal level and could not remove any state-granted rights, and it was narrowly construed to forbid "special class status" rather than depriving homosexuals of all rights under municipal laws. See *id.* at 296-97. The Sixth Circuit thus followed the reasoning suggested by Justice Scalia.

effect of *Equality Foundation of Greater Cincinnati*, citizens of a municipality can affirmatively refuse to offer any discrimination protection to homosexuals. Experience has also shown that anti-discrimination laws based on sexual orientation are vulnerable to repeal.²²

Given the lack of uniformity in the drafting of the laws, the contrary judicial opinions interpreting them, and their questionable enforcement, many have concluded that local regulation cannot be relied upon to adequately protect gays and lesbians from discrimination in employment.²³ The next section considers state statutes as an alternative.

2. State Statutes

Wisconsin led the way for states passing laws that ban sexual orientation discrimination in employment when it enacted a gay-rights law in 1982.²⁴ Over the next twenty-seven years, other states have followed suit, such that eleven states and the District of Columbia now have statutes prohibiting discrimination on the basis of sexual orientation.²⁵ Some states that lack a specific provision barring sexual orientation discrimination in employment have "lifestyle protection statutes" that may extend some protection to homosexuals.²⁶ Additionally, in

²¹ See *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 525 U.S. 943 (1998) (mem.).

²² There is currently a petition drive in Dade County, Florida, to repeal a local ordinance prohibiting sexual orientation discrimination in housing, employment, and public accommodation. See Don Finefrock, *Miami-Dade County, Florida, Allows Drive to Reverse Law Banning Gay Bias*, *MIAMI HERALD*, Feb. 9, 2000, at A3. Dade County gained notoriety in 1977 as a result of the successful campaign to overturn a similar ordinance led by Anita Bryant. See *id.*

²³ See Ronnie Cohen et al., *Employment Discrimination Based on Sexual Orientation: The American, Canadian and U.K. Responses*, 17 *LAW & INEQ. J.* 1, 19–20 (1999) (noting that the "patchwork" of protection offered under state and local ordinances is "seriously and obviously deficient"); Landau, *supra* note 1, at 346–47 (asserting that the "localized approach" creates a variety of problems); Readler, *supra* note 9, at 808 (noting the problem with local governments losing the ability to enforce local law).

²⁴ See WIS. STAT. §§ 111.19–111.36 (1996).

²⁵ See CAL. GOV'T CODE § 12940 (West Supp. 2000); CONN. GEN. STAT. §§ 46a–81c (1999); D.C. CODE ANN. § 1-2512 (1999); HAW. REV. STAT. §§ 368-1, 378-2 (1993); MASS. GEN. LAWS ch. 151B, § 4 (1998); MINN. STAT. §§ 363.03, 363.12 (1996); NEV. REV. STAT. ANN. 610.020, 613.340 (Michie 2000); N.H. REV. STAT. ANN. §§ 354-A:7, :8 (Supp. 1999); N.J. REV. STAT. §§ 10:2-1, :5-4, :5-12 (West 1993 & Supp. 2000); R.I. GEN. LAWS §§ 28-5-2, 28-5-7 (1995); VT. STAT. ANN. tit. 21, § 495 (Supp. 1999); WIS. STAT. § 111.36 (1996). Maine had enacted a similar law prohibiting sexual orientation discrimination in employment, but the law was repealed by a statewide referendum. See ME. REV. STAT. ANN. tit. 5, §§ 4552, 4553 (West 1997) (repealed 1998).

²⁶ For a more complete discussion of this topic, see Angela Gilmore, *Employment Protection for Lesbians and Gay Men*, 6 *LAW AND SEXUALITY* 83, 103–106 (1996). There is a

some states, executive orders ban employment discrimination on the basis of sexual orientation.²⁷

State statutes prohibiting employment discrimination²⁸ on the basis of sexual orientation can be divided into two groups. In some states, sexual orientation is specifically enumerated as a protected class in a general anti-discrimination law.²⁹ In other states, sexual orientation is protected under a provision separate from those protecting other categories.³⁰ While at least one scholar has argued that these two different types of statutes have been interpreted to provide the same type of protection,³¹ there is some evidence that stand-alone statutes provide different and less protection.³²

The enactment of these state statutes over the past three decades is preferable to a reliance on local ordinances because state statutes are more politically secure,³³ do not run as great a risk of preemption,³⁴ and necessarily have a

suggestion that dating and cohabiting are protected as "recreational activities," which may not be the basis for discrimination under New York law; this might be extended to offer protection to gays and lesbians. *See* State v. Wal-Mart Stores, 621 N.Y.S.2d 158 (N.Y. App. Div. 1995) (invalidating fraternization policy as discrimination against recreational activity of dating); Pasch v. Katz Media Corp., No. Civ. 8564, 1995 WL 469710, at *4 (S.D.N.Y. Aug. 8, 1995) (holding that heterosexual cohabitation is protected recreational activity).

²⁷ *See, e.g.*, Iowa Exec. Order No.7 (1999) (prohibiting sexual orientation discrimination in public employment); N.Y. Exec. Order 28.1 (1993) (same). In Louisiana, a similar executive order, La. Exec. Order No. 92-7 (1992), was allowed to expire. In Ohio, an executive order was rewritten to exclude gay state employees. *See* Ohio Exec. Order 83-64 (1983, rewritten 1999). For a more complete listing of states protecting sexual orientation discrimination by executive order, *see Summary, supra* note 7.

²⁸ Many state anti-discrimination statutes extend protection beyond employment to cover areas such as public accommodations, housing, credit, and other areas. *See, e.g.*, N.J. STAT. ANN. § 10:5-12 (West 1993) (prohibiting discrimination in employment, housing, credit, or public accommodation); MASS. GEN. LAWS ch. 151B, § 4 (1998) (prohibiting discrimination in employment, housing, and credit).

²⁹ *See, e.g.*, MINN. STAT. §§ 363.12(1) (1996) (prohibiting discrimination against an individual because of that individual's "race, color, creed, religion, national origin, sex, marital status, disability, status with regard to public assistance, sexual orientation, and age").

³⁰ *See, e.g.*, CONN. GEN. STAT. §§ 46a-81c (1999).

³¹ *See* Gilmore, *supra* note 26, at 97 ("Although two patterns have emerged, each appears to be equally effective.").

³² One California trial court interpreted a stand-alone statute not to support a harassment claim which would have been actionable under the state's general anti-discrimination provision. *See* Lambda Legal Defense and Education Fund, *Cases: Murray v. Oceanside Unified School District*, <http://www.lambdalegal.org/cgi-bin/pages/cases/record?record=85> (last modified September 1, 2000) (on file with the Ohio State Law Journal). For a complete discussion of this potential problem, *see infra* notes 196-202 and accompanying text.

³³ Unlike local governments, states cannot categorically forbid the adoption of laws protecting homosexuals from discrimination. *See* Romer v. Evans, 517 U.S. 620 (1996), discussed *infra* notes 82-91 and accompanying text.

broader reach and more uniform application.³⁵ Unfortunately, as was made clear recently in Maine, even state statutes are vulnerable to repeal, and they can lead to heated and divisive political conflict.³⁶ Moreover, only ten states have afforded protection to gays and lesbians over the course of eighteen years suggesting that any meaningful consensus among the states on this issue is still years away. Federal legislation would not be vulnerable to political referenda or preemption and would ensure uniformity on the national level.

3. Federal Statutes

Federal anti-discrimination law prohibits employment discrimination on the bases of race, religion, national origin, and sex;³⁷ age;³⁸ and disability;³⁹ but not sexual orientation.⁴⁰ Title VII does not explicitly define the term "sex." However, the courts have read sex to mean gender, and rejected all attempts to extend Title VII's protections to sexual orientation.⁴¹ While there have been several proposals to amend Title VII to include sexual orientation in the list of protected categories, they have all failed.⁴² Recent legislative action in this area has focused on passage of ENDA.⁴³ ENDA was first introduced in the House in 1994.⁴⁴ It has been

³⁴ There is no federal law addressing discrimination on the basis of sexual orientation that could preempt state law. However, there is a potential problem with preemption under ERISA of state programs that concern domestic partnership benefits. *See generally* Catherine L. Fisk, *ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment*, 8 UCLA WOMEN'S L.J. 267 (1998) (noting that it is widely assumed that ERISA would preempt application of sexual orientation discrimination laws against private sector employee benefit plans).

³⁵ *See Developments in the Law—Employment Discrimination, Statutory Protection for Gays and Lesbians in Private Employment*, 109 HARV. L. REV. 1625, 1630–31 (1996) (noting that the development of state law in this area has led to the reevaluation of some tenets of constitutional law, and bringing light to the states' role in expanding civil rights protections).

³⁶ *See* Sharon M. McGowan, Recent Development, *The Fate of ENDA in the Wake of Maine: A Wake-Up Call to Moderate Republicans*, 35 HARV. J. ON LEGIS. 623, 633 (1998) (noting that the repeal of Maine's anti-discrimination statute "magnifies the importance of federal legislation [to address sexual orientation discrimination]").

³⁷ Title VII, 42 U.S.C. § 2000e-2 (1994).

³⁸ Age Discrimination Employment Act, 29 U.S.C. § 623(a) (1994).

³⁹ Americans with Disabilities Act, 42 U.S.C. § 12112 (1994).

⁴⁰ While there is no legislation addressing this issue, in 1998, President Clinton issued an executive order that added sexual orientation to the list for which discrimination is prohibited in the federal civilian work force. Exec. Order No. 13,087, 3 C.F.R. 191 (1999) (amending Exec. Order No. 11,478, 3 C.F.R. 133–35 (1999)).

⁴¹ *See infra* Part II.B.1.

⁴² *See, e.g.*, H.R. 2074, 96th Cong. (1979); H.R. 8269, 95th Cong. (1977).

⁴³ For a description of the provisions of ENDA, *see infra* Part III.

⁴⁴ *See* H.R. 4636, 103d Cong. (1994).

reintroduced in each subsequent Congress,⁴⁵ and in 1996 failed in the Senate by only one vote.⁴⁶

In contrast to the failed attempts to extend protection to sexual orientation, Congress has had some recent success in enacting statutes which are commonly seen as hostile to the gay rights movement: the "Don't Ask, Don't Tell" policy⁴⁷ and the Defense of Marriage Act (DOMA).⁴⁸ "Don't Ask, Don't Tell" is the military policy on sexual orientation that allows the military to discharge members who engage or attempt to engage in homosexual acts, "tell" that they are homosexual or bisexual, or try to marry someone of the same sex.⁴⁹ DOMA limits the definition of marriage to a union of a man and a woman,⁵⁰ and allows states to refuse to recognize marriage licenses issued to same-sex couples by another state.⁵¹

B. *Federal Case Law*

Since Congress has failed to enact legislation specifically forbidding sexual orientation discrimination, victims of such discrimination have attempted to find support for their claims under Title VII or the Constitution. This section examines the success and likely future of maintaining a claim for sexual orientation discrimination under existing law, and specifically looks at the Supreme Court's recent decision in *Boy Scouts of America v. Dale*.⁵²

1. *Title VII and Sexual Orientation Discrimination*

*DeSantis v. Pacific Telephone & Telegraph Co.*⁵³ was the federal case that most clearly established that sexual orientation discrimination was not actionable under Title VII. In *DeSantis*, three appeals were consolidated: in one, a man claimed he was fired from his job at a nursery school because he wore an earring to work prior to the beginning of the school year; in the second, three men claimed that Pacific Telephone and Telegraph (PT&T) discriminated against them on the basis of their homosexuality; and in the third, two women who

⁴⁵ ENDA was reintroduced in the House in 1995. See H.R. 1863, 104th Cong. (1995). In 1997, it was reintroduced in both the House and the Senate. See H.R. 1858, 105th Cong. (1997); S. 869, 105th Cong. (1997).

⁴⁶ John E. Yang, *Senate Passes Bill Against Same-Sex Marriage*, WASH. POST, Sept. 11, 1996, at A1.

⁴⁷ 10 U.S.C. § 654(b)(1994).

⁴⁸ 1 U.S.C. § 7 (Supp. IV 1998); 28 U.S.C. § 1738C (Supp. IV 1998).

⁴⁹ 10 U.S.C. § 654(b)(1994).

⁵⁰ 1 U.S.C. § 7 (Supp. IV. 1998).

⁵¹ 28 U.S.C. § 1738C (Supp IV. 1998).

⁵² 120 S. Ct. 2446 (2000).

⁵³ 608 F.2d 327 (9th Cir. 1979).

worked at PT&T alleged that they had been discriminated against because of their lesbian relationship.⁵⁴ The men had first filed charges with the Equal Employment Opportunity Commission (EEOC), but the EEOC rejected the claims, asserting that it had no jurisdiction over sexual orientation discrimination claims.⁵⁵ The district court dismissed all suits for failure to state a claim upon which relief could be granted.⁵⁶ The Ninth Circuit agreed, and gave four reasons for its holding.⁵⁷ First, the court noted that “cases interpreting Title VII sex discrimination provisions agree that they were intended to place women on an equal footing with men.”⁵⁸ Based on this determination of congressional intent, the court refused to judicially extend “sex” to cover “sexual preference” such as homosexuality.⁵⁹ Second, the *DeSantis* court refused to find that sexual orientation discrimination affected one sex more than the other and thus the plaintiffs failed to establish disparate impact⁶⁰ under the framework earlier developed by the Supreme Court in *Griggs v. Duke Power Co.*⁶¹ Third, the court summarily rejected the claim that sexual orientation discrimination violated Title VII by using different employment criteria for men and women, again refusing to “bootstrap” protection for homosexuals.⁶² Finally, the court addressed the argument that sexual orientation discrimination was protected because it was based on the gender of a person’s associates.⁶³ After determining that sexual

⁵⁴ *Id.* at 328–29.

⁵⁵ *Id.* at 328. The women did not file initial charges with the EEOC, but claimed that their union failed to represent them adequately. *Id.* at 329.

⁵⁶ *Id.* at 328–29.

⁵⁷ *Id.* at 329–31.

⁵⁸ *Id.* at 329 (quoting *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977)). The *Holloway* court used the reasoning to deny Title VII protection to transsexuals. *See Holloway*, 566 F.2d at 662.

⁵⁹ *DeSantis*, 608 F.2d at 329–330.

⁶⁰ *Id.* at 330. The court assumed that the plaintiffs could establish the disparate impact, but refused to “bootstrap” protection clearly not envisioned by Congress into Title VII using this methodology. *Id.* The court did not discuss how the appellants could prove disparate impact. *See id.* *See also infra* note 175–76 and accompanying text (noting the difficulty of obtaining the statistics needed to bring a disparate impact claim for sexual orientation discrimination).

⁶¹ 401 U.S. 424 (1971). The disparate impact framework is discussed more fully at *infra* notes 167–81 and accompanying text.

⁶² *See DeSantis*, 608 F.2d at 331. The appellants had argued that by treating a male who preferred male sexual partners differently from a female who preferred male sexual partners established different employment criteria on the basis of sex. *See id.*

⁶³ *See id.* The appellants analogized their situation to those who suffered racial discrimination based on the race of their friends. *See id.* Courts have found that antimiscegenation discrimination is prohibited under Title VII as a type of race discrimination. *See, e.g., Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891–92 (11th Cir. 1986); *Reiter v. Ctr. Consol. Sch. Dist.*, 618 F. Supp 1458, 1460 (D. Colo. 1985) (“[Discrimination] based on an individual’s association with people of a particular race or national origin [is]

orientation was not protected under "sex," the court then also declined to include disparate treatment based on "effeminacy" as sex discrimination.⁶⁴

Earlier cases had established that transsexuals⁶⁵ and effeminate men⁶⁶ were not entitled to protection under the sex discrimination provisions of Title VII, and *DeSantis* confirmed the belief that "sex" should be read as "gender."⁶⁷ Federal cases that followed *DeSantis* uniformly refused to find that sexual orientation was protected under Title VII,⁶⁸ and seemed reluctant to address otherwise legitimate claims that could be seen as based on sexual orientation.⁶⁹ But some division did spring up in the courts in the area of sexual harassment, and whether same-sex sexual harassment could be considered discrimination "because of" sex.⁷⁰

In 1998, the Supreme Court addressed the issue of same-sex sexual harassment in *Oncale v. Sundowner Offshore Services, Inc.*⁷¹ In this case, petitioner Joseph Oncale sued his employer under Title VII, claiming sexual harassment at the hands of male coworkers.⁷² The Court found that because the phrase "'because of . . . sex' protects men as well as women," there was consequently no justification for a blanket rule excluding Title VII protection from same-sex harassment.⁷³ But the Court insisted that for such a claim to

prohibited under Title VII."). The parallel reasoning that discrimination on the basis of a homosexual relationship is discrimination based on sex has been noted by the Hawaii Supreme Court. *Baehr v. Lewin*, 852 P.2d 44, 57-64 (Haw. 1993) (remanding for further proceedings to determine whether a statute allowing heterosexual marriage, but not homosexual marriage, violated the Equal Protection Clause of Hawaii's constitution because it discriminated on the basis of sex).

⁶⁴ See *Desantis*, 608 F.2d at 331-32. The court relied on the Fifth Circuit's reasoning in *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978) (refusing to protect an effeminate man from discrimination under Title VII).

⁶⁵ *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977); see also *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

⁶⁶ *Smith*, 569 F.2d at 326-27 (5th Cir. 1978).

⁶⁷ *DeSantis*, 608 F.2d at 331.

⁶⁸ See, e.g., *Sarff v. Cont'l Express*, 894 F. Supp. 1076 (S.D. Tex. 1995), *aff'd*, 85 F.3d 624 (5th Cir. 1996).

⁶⁹ See, e.g., *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam) (determining that an employer who fired a gay Black man was more concerned with his homosexuality than his race); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam) (in declining to find pretext where employee claimed he was fired for being a Jewish White male homosexual, the court noted that there is no claim for sexual orientation discrimination under Title VII).

⁷⁰ Compare *Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133, 1137 (C.D. Ill. 1995) (holding Title VII protects a male harassed by a male supervisor), with *Mayo v. Kiwest Corp.*, 898 F. Supp. 335, 337-38 (E.D. Va. 1995) (holding Title VII does not protect a male harassed by male supervisor).

⁷¹ 523 U.S. 75 (1998).

⁷² *Id.* at 76-77.

⁷³ *Id.* at 78-79.

succeed, the plaintiff must prove the harassment was “not merely tinged with offensive sexual connotations, but actually constituted [sex discrimination].”⁷⁴ In the Court’s view, the harassing conduct did not need to be motivated by sexual desire if it could be shown that the conduct was directed at someone because of their gender.⁷⁵ The Court made no mention of the sexual orientation of either the harassed or the harasser anywhere in the opinion.

Since *Oncale*, the federal courts have shown a willingness to hear claims based on same-sex sexual harassment.⁷⁶ If, however, such harassment is due to the harasser’s actual or perceived sexual orientation, it is not considered to be “because of sex,” and is thus not punishable.⁷⁷ Interestingly, if the harasser in a same-sex harassment case is gay, then the harassment is presumed to be “because of sex.”⁷⁸ The resulting jumble of law has been much criticized,⁷⁹ but it seems clear that Title VII, as is, does not punish sexual orientation harassment.

In the end, it seems that the Supreme Court has interpreted Title VII so that “sex” equals gender.⁸⁰ While the Court has never directly addressed whether sexual orientation can equal “sex,” the language of *Oncale* and the uniform view of the circuit courts that have addressed the issue make clear that Title VII is to be interpreted as not prohibiting sexual orientation discrimination in the workplace. Therefore, the current Title VII framework is insufficient to protect homosexuals from employment discrimination.

⁷⁴ *Id.* at 81.

⁷⁵ *Id.* 80–81.

⁷⁶ See, e.g., *Llampallas v. Mini-Circuits Lab, Inc.*, 163 F.3d 1236, 1247 (11th Cir. 1998) (hearing a lesbian’s claim that she was fired for refusing to resume a relationship with a coworker); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1012 (7th Cir. 1999) (reversing a summary judgment order, finding that allegations, if proved, could form the basis of a Title VII claim for same-sex harassment by a homosexual harasser).

⁷⁷ See, e.g., *Higgins v. New Balance Athletic Show, Inc.*, 21 F. Supp. 2d 66, 76 (D. Me. 1998) (holding that same-sex harassment based on plaintiff’s conceded homosexuality is not covered under Title VII, given that Title VII does not protect sexual orientation).

⁷⁸ See, e.g., *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1505 (11th Cir. 1997) (“[T]he reasonably inferred motives of the homosexual harasser are identical to those of the heterosexual harasser—i.e., the harasser makes advances towards the victim because the victim is a member of the gender the harasser prefers.”).

⁷⁹ See, e.g., Sony Smalleys, *Oncale v. Sundower Offshore Services: A Victory for Gay and Lesbian Rights?*, 14 BERKELEY WOMEN’S L.J. 136, 147–48 (1999) (noting that the Supreme Court struggled over same-sex harassment but offered no protection from sexual orientation discrimination).

⁸⁰ At least one court thinks that the Supreme Court’s reading of “sex” might actually be narrower than gender. See *Higgins*, 21 F. Supp. 2d at 75 n.9 (D. Me. 1998) (suggesting that the Supreme Court’s vacating of *City of Bellevue v. Doe*, 523 U.S. 1001 (1998), may show that the Court favors an even stricter reading of “sex”). Regardless, the studious avoidance of any discussion of sexual orientation in *Oncale* suggests that the Court would not extend protection to harassed homosexuals.

2. *The Constitution and Sexual Orientation Discrimination*

Although the federal courts seem to have foreclosed sexual orientation discrimination claims under Title VII, in recent years there has been a growing trend to bring these claims under the Equal Protection Clause of the Fourteenth Amendment. Uniformly, courts have refused to find that homosexuals constitute a suspect or quasi-suspect class and have refused to analyze them under heightened scrutiny.⁸¹ However, the Supreme Court has analyzed one case on equal protection grounds,⁸² and some recent federal cases employing rational basis scrutiny have afforded some protection to gays and lesbians.⁸³

In *Romer v. Evans*,⁸⁴ the Supreme Court struck down Colorado's Amendment 2, a constitutional amendment that prohibited all legal action in the State of Colorado designed to protect homosexuals from discrimination.⁸⁵ Amendment 2 had been adopted by public referendum with the goal of invalidating local ordinances in Aspen, Boulder, Denver, and elsewhere that prohibited sexual orientation discrimination in some way.⁸⁶ Colorado claimed that this provision merely put gays and lesbians in the same position as all other persons, and did no more than deny "special" rights to homosexuals.⁸⁷ The Court disagreed, and found that "the amendment impose[d] a special disability on [homosexuals] alone."⁸⁸ Under an Equal Protection analysis, the Court held that the state's asserted justification failed to meet the rational basis test.⁸⁹ The Court characterized the amendment as both too narrow and too broad: "identif[y]ing persons by a single trait and then den[ying] them protection across the board."⁹⁰ It

⁸¹ See, e.g., *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987). The District Court of Kansas found that homosexuals did constitute a suspect class for equal protection analysis, but the case was reversed on appeal. See *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991), *rev'd*, 976 F.2d 623 (10th Cir. 1992). Scholars have continually argued that gay men and lesbians should be seen as a suspect class. See, e.g., Sunanda K. Ray-Holmes, *Discrimination Based on One's Sexual Preference: Should Strict Scrutiny Apply?*, 34 HOW. L.J. 341, 366 (1991). But see Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 401-412 (1994) (arguing that gays and lesbians should not be considered a suspect class).

⁸² *Romer v. Evans*, 517 U.S. 620 (1996).

⁸³ See, e.g., *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998); *Quinn v. Nassau County Police Dep't*, 53 F. Supp. 2d 347, 356-58 (E.D.N.Y. 1999).

⁸⁴ 517 U.S. 620 (1996).

⁸⁵ *Id.* at 635.

⁸⁶ *Id.* at 623-34.

⁸⁷ *Id.* at 626.

⁸⁸ *Id.* at 631.

⁸⁹ *Id.* at 631-632.

⁹⁰ *Id.* at 633.

was further found that Amendment 2 violated conventional principles of legislation; it did not bear a rational relation to a legitimate governmental purpose, because it was aimed at harming a politically unpopular group out of animosity.⁹¹

While the Supreme Court has not addressed whether the Equal Protection Clause can be violated when a state discriminates against its employees on the basis of sexual orientation, several lower courts have addressed the issue. In *Weaver v. Nebo School District*,⁹² a public school teacher successfully challenged a school district's restriction on her speech prohibiting her from discussing her sexual orientation, as well as the decision not to appoint her as volleyball coach on the basis that she was gay.⁹³ In discussing the claim of sexual orientation discrimination, the court first noted that sexual orientation was not "recognized . . . as a status that deserves heightened protection," and that no federal or state law (in Utah) protected employment discrimination on the basis of sexual orientation.⁹⁴ The court then went on, though, to cite the Equal Protection Clause and analyzed the teacher's discharge to see if there was a rational basis for the decision.⁹⁵ After distinguishing cases upholding the "Don't Ask, Don't Tell" policy on the ground that the military context was sufficiently different from the civilian context at issue, the court noted that "[t]he 'negative reaction' some members of the community may have to homosexuals is not a proper basis for discriminating against them."⁹⁶ It analogized to racial school segregation as another unconstitutional practice despite its former widespread acceptance.⁹⁷ Then the court found that the school district showed no job-related justification for its decision not to appoint the teacher as volleyball coach, as the district could not show a rational relationship between her sexual orientation and her coaching abilities.⁹⁸ The court ended by noting that while "the Constitution cannot control prejudices, [no] . . . court . . . should, directly or indirectly, legitimize them."⁹⁹

Harassment on the basis of sexual orientation has also been found unlawful under the Equal Protection Clause in *Quinn v. Nassau County Police Department*.¹⁰⁰ In *Quinn*, a homosexual police officer brought a § 1983 action against the police department and officers, alleging, in part, that the harassment he had suffered because of his sexual orientation created a hostile work environment

⁹¹ *Id.* at 634–45.

⁹² 29 F. Supp. 2d 1279 (D. Utah 1998).

⁹³ *Id.* at 1289–90.

⁹⁴ *Id.* at 1287.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1288–1289.

⁹⁷ *See id.* at 1289.

⁹⁸ *See id.*

⁹⁹ *Id.*

¹⁰⁰ 53 F. Supp. 347, 356–58 (E.D.N.Y. 1999).

and violated his Equal Protection rights.¹⁰¹ The court, in its equal protection analysis, first noted that sex discrimination by a government employer was covered by § 1983.¹⁰² The court cited *Romer v. Evans*, and found that the supervising officers' failure to address and outright condoning of homosexual harassment was "impermissible 'status-based' [conduct and policy] divorced from any factual context from which we could discern a relationship to legitimate state interests."¹⁰³ In these circumstances, the court found that the only inference to be drawn from Quinn's mistreatment was that it derived from animosity toward homosexuals.¹⁰⁴ The court distinguished a district court ruling precluding a homosexual harassment claim under Title VII¹⁰⁵ by saying that Equal Protection analysis is not limited by express categories, as is Title VII.¹⁰⁶

Do *Romer*, *Weaver*, and *Quinn* suggest that the same courts that are reluctant to extend "sex" to encompass sexual orientation in Title VII are willing to find that sexual orientation discrimination by the state violates the Equal Protection Clause? Perhaps, but the continued failure of any court to recognize homosexuals as a class deserving of heightened protection is troubling, especially in light of *Kimel v. Florida Board of Regents*.¹⁰⁷ In *Kimel*, the Supreme Court held that the doctrine of sovereign immunity barred federal jurisdiction over Age Discrimination Employment Act (ADEA) suits brought by private individuals against the states.¹⁰⁸ The Court found that Congress had explicitly intended to abrogate the states' sovereign immunity,¹⁰⁹ but lacked the power under the Fourteenth Amendment to do so.¹¹⁰ The Court held that because age was not a

¹⁰¹ *Id.* at 355. Section 1983 is codified at 42 U.S.C. § 1983.

¹⁰² *Id.* at 356. The court cited two cases for this proposition: *Annis v. County of Westchester*, 36 F.3d 251, 254 (2d Cir. 1994), and *Davis v. Passman*, 442 U.S. 228, 234-35 (1979).

¹⁰³ *Quinn*, 53 F. Supp. at 358 (alteration in original) (quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996)).

¹⁰⁴ *Quinn*, 53 F. Supp. at 358.

¹⁰⁵ *Simonton v. Runyon*, 50 F. Supp. 2d 159 (E.D.N.Y. 1999).

¹⁰⁶ *Quinn*, 53 F. Supp. at 359.

¹⁰⁷ 120 S. Ct. 631 (2000).

¹⁰⁸ *Id.* at 650. *Kimel* followed a series of Court decisions invoking state sovereign immunity to deny jurisdiction over suits against states. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996); *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 119 S. Ct. 2219, 2233 (1999). The Court has also granted certiorari on a case challenging the ADA on sovereign immunity grounds. *See University of Alabama at Birmingham Bd. of Trs. v. Garrett*, 527 U.S. 666, 689 (mem.) (2000).

¹⁰⁹ *See Kimel*, 120 S. Ct. at 640. The test requires that Congress make its intention to override the Eleventh Amendment "unmistakably clear in the language of the statute." *Id.* (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

¹¹⁰ *See Kimel*, 120 S. Ct. at 644. The Court had previously held that Congress could not abrogate the states' sovereign immunity to suits brought by private individuals under Article I (the Commerce Clause). *See Seminole Tribe*, 517 U.S. at 72-73. Therefore, the ADEA could

suspect class, the ADEA was not an appropriate, proportional law under section five of the Fourteenth Amendment.¹¹¹

The result in *Kimel* suggests that sexual orientation discrimination claims brought against states will raise sovereign immunity issues. While it is relatively easy to write a statute that explicitly sets out to abrogate state immunity,¹¹² it is hard to get around the decisions that have found that sexual orientation is not a suspect class and sexual orientation discrimination can be upheld under the rational basis test. *Weaver* and *Quinn* show that state action can still be successfully challenged on equal protection grounds, but under *Kimel*, it is unclear whether any federal statute could provide grounds for a legal challenge.¹¹³

While *Weaver* and *Quinn* suggest that sexual orientation discrimination can fail even minimal scrutiny under equal protection analysis, not all courts have agreed.¹¹⁴ Moreover, equal protection analysis applies only to state actors—private employees cannot succeed on these claims. And there is a possibility that any sexual orientation anti-discrimination statute passed will be inapplicable to the states after *Kimel*. The Constitution, then, does not provide an answer to the problem of sexual orientation discrimination.

3. Boy Scouts of America v. Dale¹¹⁵

In *Boy Scouts of America v. Dale*,¹¹⁶ the Supreme Court held that a New Jersey law prohibiting sexual orientation discrimination by public accommodations could not be applied to force the Boy Scouts to reinstate a gay troop leader. The Court's decision was founded on the First Amendment—to force the Boy Scouts to accept gay men would violate their freedom of association. While the *Dale* rationale will not apply to a hypothetical federal law

abrogate sovereign immunity only if it were "appropriate" legislation under Section 5 of the Fourteenth Amendment. See *Kimel*, 120 S. Ct. at 644.

¹¹¹ Because age is not a suspect class, an age-based classification is upheld if it is rationally related to a legitimate state interest. See *Kimel*, 120 S. Ct. at 645–46. The court applied a proportionality test, and found that by forbidding all discrimination on the basis of age, Congress had overstepped its Section 5 power, since it had no evidence that state and local governments were unconstitutionally discriminating. See *id.* at 650.

¹¹² ENDA would pass this first test. See S. 1276, 106th Cong. § 13 (1999) ("A State shall not be immune under the 11th amendment to the Constitution from an action in a Federal court of competent jurisdiction.").

¹¹³ This further suggests that, despite their shortcomings, state anti-discrimination statutes may play an important role in combating sexual orientation discrimination.

¹¹⁴ See *supra* note 80.

¹¹⁵ 120 S. Ct. 2446 (2000).

¹¹⁶ *Id.*

prohibiting sexual orientation discrimination in employment,¹¹⁷ the Court's reasoning is instructive as to both the need for such federal legislation and the way that the Court treats sexual orientation differently from other classes protected under anti-discrimination laws.

James Dale, an assistant scoutmaster, was expelled from the Boy Scouts of America (BSA) once it was discovered that he was gay.¹¹⁸ Dale claimed that the BSA violated New Jersey's Law Against Discrimination (LAD),¹¹⁹ which prohibits sexual orientation discrimination in places of public accommodation.¹²⁰ The New Jersey Supreme Court found for Dale, holding that the BSA did violate LAD and that enforcement of LAD did not impinge upon the BSA's First Amendment rights of association or speech.¹²¹ The United States Supreme Court, in a 5-4 decision, reversed, holding that the BSA's right of expressive association was violated by application of LAD in these circumstances.¹²²

The Supreme Court's decision was based on its finding that the BSA publicly expressed a view that homosexuality is inconsistent with the BSA's requirement that Scout's be "morally straight."¹²³ The Court noted that a compelling state interest can justify a state intrusion on an organization's associational rights, but found that the state interests in this case did not.¹²⁴ The dissent, in contrast, argued that no constitutional rights of the BSA had been infringed.¹²⁵ The dissent noted that harmful anti-gay prejudice "can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers."¹²⁶

The result of the *Dale* decision seems to be that any group that presents "moral" objections to gays and lesbians is free to discriminate under the First

¹¹⁷ Employers cannot claim the same freedom of association right.

¹¹⁸ *Id.* at 2449.

¹¹⁹ N.J. STAT. ANN. §§ 10:2-1, :5-4, :5-12 (West 1993 & Supp. 2000).

¹²⁰ *Dale*, 120 S. Ct. at 2449-50.

¹²¹ *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1230 (N.J. 1999)

¹²² *Dale*, 120 S. Ct. at 2449.

¹²³ *Id.* at 2453-54. The Supreme Court accepted the BSA's assertion that homosexuality conflicted with its ideal of "morally straight" on its face. *See id.*

¹²⁴ *Id.* at 2457 ("The state interests embodied in New Jersey's public accommodation law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."). *But see id.* at 2479 (Souter, J., dissenting) ("BSA has not made out an expressive association claim . . . because of its failure to make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message.").

¹²⁵ *Id.* at 2460 (Stevens, J., dissenting). The dissent found it "exceedingly difficult to believe that BSA . . . adopts a single particular religious or moral philosophy when it comes to sexual orientation" and found that by looking at the actual teachings of the BSA, there was no "expression" against homosexuality which implicated the First Amendment. *See id.* at 2462-63.

¹²⁶ *Id.* at 2478. (Stevens, J., dissenting).

Amendment. One must question, though, whether the Court would have reached the same result in *Dale* if the Boy Scouts held the belief that only Caucasians were “morally straight.” In fact, as the dissent noted, the Court has routinely struck down association claims to anti-discrimination laws brought by groups with exclusionary membership policies.¹²⁷ The dissent claimed that “[t]he only apparent explanation for the majority’s holding . . . is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual’s—should be singled out for special First Amendment treatment.”¹²⁸

The majority’s reasoning in *Dale* suggests that courts which tackle laws prohibiting sexual orientation discrimination may still be wary to apply those laws to people who discriminate on the basis of “morals.” This suggests that any federal legislation which aims to end sexual orientation discrimination is likely to be met by great resistance from the courts,¹²⁹ and suggests that all such legislation must be carefully drafted to avoid unintended judicial weakening.¹³⁰

III. ENDA: SEPARATE, BUT NOT EQUAL

From 1975¹³¹ until 1993, legislative attempts to protect homosexuals from discrimination focused on amending Title VII and failed.¹³² In 1993, the Employment Non-Discrimination Act (ENDA) was proposed as an alternative. Representative Barney Frank,¹³³ a supporter of ENDA, suggests it is a “better legislative response” to the problem of sexual orientation discrimination in employment than amending Title VII, and would result in “identical legal

¹²⁷ *Id.* at 2467–68 (Stevens, J., dissenting). The following cases are cited by the dissent: *Runyon v. McCrary*, 427 U.S. 160, 175–76 (1976) (forbidding private schools from adopting racially exclusionary admission policies); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (forbidding a law firm from denying partnership to a woman); *Ry. Mail Ass’n v. Corsi*, 326 U.S. 88, 93–94 (1945) (forbidding a labor organization to deny membership on the basis of race); *Roberts v. United States Jaycees*, 468 U.S. 609, 623–26 (forbidding Jaycees from excluding all women); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (forbidding Rotary members from excluding women).

¹²⁸ *Dale*, 120 S. Ct. at 2476 (Stevens, J., dissenting).

¹²⁹ Indeed, much of this resistance may still be due to the Supreme Court’s much-maligned decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the constitutionality of Georgia’s sodomy law).

¹³⁰ See *infra* Part III.B.

¹³¹ See H.R. 166, 94th Cong. (1975) (proposing that Title VII be amended to include sexual orientation).

¹³² See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 & n.11 (7th Cir. 1984) (describing numerous failed attempts by Congress to amend Title VII).

¹³³ Congressman Frank represents the Fourth District of Massachusetts and is openly gay. See Representative Barney Frank, at <http://www.house.gov/frank> (last modified October 18, 2000). He has long been a supporter of ENDA, and helped introduce it in 1999.

protection . . . for gay and lesbian people.”¹³⁴ He argues that amendment of Title VII would give opponents of affirmative action the chance to remove the voluntary affirmative action provision from the Civil Rights Act of 1964.¹³⁵ He also argues that legislation can be passed only if it “disavow[s] any interest in affirmative action” and that the ENDA approach is more politically popular than any involving Title VII.¹³⁶

The basic framework of ENDA is superficially similar to that of Title VII. It forbids employers from discriminating on the basis of sexual orientation with regard to hiring, firing, or terms of employment;¹³⁷ forbids retaliatory conduct;¹³⁸ and is enforced by the Equal Employment Opportunity Commission.¹³⁹ ENDA would adopt the basic disparate treatment framework developed under Title VII,¹⁴⁰ but excludes religious organizations¹⁴¹ and the military¹⁴² from its coverage; does not allow disparate impact theory¹⁴³ or affirmative action;¹⁴⁴ and does not require the provision of employee benefits to domestic partners.¹⁴⁵

¹³⁴ Barney Frank, *Civil Rights, Legislative Wrongs*, ADVOCATE, Feb. 15, 2000, at 9.

¹³⁵ See *id.* Frank also argues that the Title VII approach would allow opponents to argue that the goal is to grant homosexuals “special rights.” See *id.* The Civil Rights Act of 1964 is codified at 42 U.S.C. § 2000e-2 (1994).

¹³⁶ *Id.*

¹³⁷ S. 1276, 106th Cong. § 4(a) (1999) (“It shall be an unlawful employment practice . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment . . . , because of such individual’s sexual orientation”). ENDA also forbids segregation or classification based on sexual orientation that would result in discrimination. See *id.* § 4(a)(2). Like Title VII, ENDA also forbids discrimination by employment agencies and labor organizations. See *id.* §§ 4(b), 4(c).

¹³⁸ *Id.* § 5 (prohibiting both retaliation against and coercion of individuals who file charges under ENDA).

¹³⁹ *Id.* § 12 (granting the same enforcement power, procedures, and remedies to the EEOC as under Title VII).

¹⁴⁰ See Frank, *supra* note 134 (setting forth the basic disparate treatment theory of Title VII, where the plaintiff must make a prima facie case for discrimination, then the employer can offer a legitimate non-discriminatory reason for its adverse action). Title VII contains a statutory defense in the form of the bona fide occupational qualification (BFOQ). 42 U.S.C. § 2000e-2(e) (not discrimination if religion, sex, or national origin is a BFOQ “reasonably necessary to the normal operation of that particular business”). It could be seen as an instance where ENDA is actually stronger than Title VII on its face, but this is the provision from Title VII that is most likely to be read into ENDA. Of course, given the broad exceptions already granted under ENDA, it is unlikely that employers would need to assert a BFOQ defense.

¹⁴¹ S. 1276, 106th Cong. § 9 (1999).

¹⁴² *Id.* § 10.

¹⁴³ *Id.* § 4(f).

¹⁴⁴ *Id.* § 8.

¹⁴⁵ *Id.* § 6.

The protection of ENDA is not “identical” to that of an amended Title VII. This is because ENDA includes exceptions that do not exist in Title VII. Further, by treating sexual orientation under a stand-alone measure, Congress encourages the courts to construe ENDA differently. It is by no means clear that sexual orientation discrimination in employment will be adequately addressed by a “separate but equal” statutory provision.

A. *Exceptions to ENDA*

While ENDA is intended to provide the same anti-discrimination protection as Title VII, ENDA is different from Title VII in several key areas.¹⁴⁶ This Section explores three parts of Title VII that have been excepted from ENDA: voluntary affirmative action plans, disparate impact theory, and coverage of religious organizations.

1. *Voluntary Affirmative Action*

Title VII allows employers to adopt “voluntary affirmative action” plans.¹⁴⁷ Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employment decision, the burden shifts to the employer.¹⁴⁸ The Supreme Court requires that affirmative action plans: (1) are designed to break down “old patterns of racial [or sex-based] segregation and hierarchy”;¹⁴⁹ (2) do not “unnecessarily trammel the interests” of non-minorities;¹⁵⁰ and (3) are temporary, and designed to eliminate racial imbalance, not maintain an existent racial balance.¹⁵¹

ENDA explicitly disallows quotas and preferential treatment, and thus does not allow employers to adopt voluntary affirmative action plans.¹⁵² It is argued

¹⁴⁶ See *supra* notes 137–45 and accompanying text.

¹⁴⁷ *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). *Weber* was questioned by the Supreme Court in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), which suggested that when dealing with seniority systems, Title VII protected victims of proven discrimination but not beneficiaries of affirmative action. The basic holding of *Weber* was reaffirmed by the Court, though, in *Johnson v. Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987).

¹⁴⁸ *Johnson*, 480 U.S. at 626.

¹⁴⁹ *Weber*, 443 U.S. at 208.

¹⁵⁰ *Id.* The Court noted that a relevant inquiry on this point is whether the plan created “an absolute bar to the advancement of [non-minority] employees.” *Id.*

¹⁵¹ *Id.*

¹⁵² See S. 1276, 106th Cong. § 8(a) (1999) (“A covered entity shall not adopt or implement a quota on the basis of sexual orientation.”); *id.* § 8(b) (“A covered entity shall not give preferential treatment to an individual on the basis of sexual orientation.”); *id.* § 8(c) (“[A]n order or consent decree . . . may not include a quota, or preferential treatment . . .”).

that homosexuals have not suffered the same historical disadvantages as females and racial minorities.¹⁵³ Moreover, opponents of sexual orientation discrimination legislation feel that affirmative action is the quintessential example of a "special right" sought by homosexuals.¹⁵⁴

But what really is the harm of affirmative action? Under current law, employers may freely adopt plans that do prefer people of one sexual orientation over the other; yet there is not a rash of employers scrambling to adopt policies that favor gay and lesbian employees. Any employer that did provide affirmative action for gays and lesbians would probably face extensive criticism.¹⁵⁵ Given the derogatory "special rights" moniker often applied to these plans,¹⁵⁶ it is unlikely that even if they are permissible under law they will be widely adopted.

Two reasons have been suggested to justify affirmative action plans on the basis of sexual orientation. First, it is suggested that homosexuals are, in fact, subject to disadvantage in the workplace.¹⁵⁷ While some homosexuals might be subject to little prejudice in their fields of employment, others may be discriminated against invidiously.¹⁵⁸ Statistics that relate the economic well-being of homosexuals as a class can be misleading, as many disadvantaged individuals

¹⁵³ Professor Ruth Colker suggests that the disadvantage rationale may not be applicable in all cases because gay, lesbian, and bisexual people face differing amounts of prejudice and hardship. See RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* 81–82 (1996).

¹⁵⁴ See Jeffrey S. Byrne & Bruce R. Deming, *On the Prudence of Discussing Affirmative Action for Lesbians and Gay Men: Community, Strategy, and Equality*, 5 STAN. L. & POL'Y REV. 177, 179 (1993) (noting the success of the "special rights" rhetoric); Frank, *supra* note 134 (commenting on the "special" rights problem).

¹⁵⁵ Companies that provide domestic benefits have often been the subject of protests. See, e.g., Lisa Perry, *Demonstration: Group Protests Disney 'Agenda'*, DAYTON DAILY NEWS, July 11, 1999, at 10A (discussing the boycott of Disney carried out to protest its "pro-gay agenda," including offering domestic partner benefits).

¹⁵⁶ Representative Frank has stated that ENDA was proposed in large part to avoid the "special rights" claim. See Marcelo Vilela, *Out in Congress*, available at http://www.house.gov/frank/k_state.html (last modified Feb. 28, 2000) (quoting Frank as saying that "trying to change the Civil Rights Act would be used by opponents of gay rights to reinforce the false political argument that gays were trying to get affirmative action") (on file with the Ohio State Law Journal). See also 142 CONG. REC. S10,054, S10,057 (daily ed. Sept. 9, 1996) (statement of Sen. Kennedy) ("There are no quotas or preferential treatment."). Many scholars view the debate over "special" versus "equal" rights as a false dichotomy, and several suggest that the only way to reach equality is to grant these "special rights." See generally Marcossou, *supra* note 1, at 158–59 (arguing that "special rights" are no more than basic civil rights and the "special rights" argument is inconsistent with modern views of civil rights and is merely an appeal to prejudices).

¹⁵⁷ See Byrne & Deming, *supra* note 154.

¹⁵⁸ See COLKER, *supra* note 153, at 81. Professor Colker suggests that "individualized storytelling," or looking to the disadvantage faced by a specific individual, may be the best way to justify implementing affirmative action by an individual. *Id.*

may choose not to identify themselves as homosexual.¹⁵⁹ Does it make sense to assert on the one hand that homosexuals as a class are discriminated against invidiously, while at the same time denying that the class is subject to any disadvantage in obtaining employment opportunity?

Second, affirmative action might be supported under a "role model theory."¹⁶⁰ Under this theory, "out" individuals are entitled to preferential treatment so that they might serve as role models for other homosexuals.¹⁶¹ The presence of gay and lesbian employees in the workplace would "symbolically challenge stereotypes" and "promote[] acceptance through daily interaction" among heterosexual and homosexual employees.¹⁶² Openly gay employees can help employers as well, by developing mentoring relationships with other gay employees.¹⁶³

Education is one employment context that clearly shows how both justifications for affirmative action can coexist. Teachers, as a group, have been subject to an inordinate amount of anti-gay discrimination in their work.¹⁶⁴ Within the schools, there is also a particular need for gay and lesbian teachers to serve as role models.¹⁶⁵ Not surprisingly, some colleges have adopted affirmative

¹⁵⁹ It is hypothesized that individuals who are economically well-off are more able and willing to identify themselves as homosexuals, and that this might skew the existing data. There is also some evidence that gay men are paid disproportionately less than their heterosexual coworkers. See Badgett, *supra* note 1, at 737 (reporting incomes reduced by 11% to 27%).

¹⁶⁰ See Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 YALE L. & POL'Y REV. 47, 69-70 (1993) (discussing the "role model" theory).

¹⁶¹ See *id.*; COLKER, *supra* note 153, at 82.

¹⁶² Byrne, *supra* note 160, at 69-70.

¹⁶³ See *id.* at 70.

¹⁶⁴ This is evidenced in part by the sheer number of discrimination suits that have been raised by teachers. See, e.g., *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998) (discussed *supra* notes 92-99 and accompanying text); *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992) (discussed *supra* note 81); *Morrison v. State Bd. of Ed.*, 461 P.2d 375 (Cal. 1969) (en banc) (state teaching certification was improperly revoked because of Mr. Morrison's homosexual relationship). Testimony during Senate floor debate on ENDA in 1996 shows that several Senators were opposed to ENDA in part because it would apply to schools. See, e.g., 142 CONG. REC. S9986, S10,000 (daily ed. Sept. 6, 1996) (statement of Sen. Ashcroft); 142 CONG. REC. S9986, S10,000 (daily ed. Sept. 6, 1996) (statement of Sen. Nickles); 142 CONG. REC. S9986, S10,003 (daily ed. Sept. 6, 1996) (statement of Sen. Hatch).

¹⁶⁵ See Anthony E. Varona, *Setting the Record Straight: The Effects of the Employment Non-Discrimination Act of 1997 on the First and Fourteenth Amendment Rights of Gay and Lesbian Public Schoolteachers*, 6 COMMLAW CONSPPECTUS 25, 34-35 (arguing that the lack of positive role models for gay schoolchildren furthers their sense of isolation). See also A. Damien Martin & Emery S. Hetrick, *The Stigmatization of the Gay and Lesbian Adolescent*, 15 J. HOMOSEXUALITY 163, 167 (1988) ("There is little or no opportunity for the homosexually oriented adolescent to discover what it means to be homosexual.").

action-like practices to increase the number of gay and lesbian professors.¹⁶⁶ Given the disadvantage faced by gay and lesbian educators and their positive value as role models, affirmative action plans based on sexual orientation are justified.

2. *Disparate Impact Theory*

Developed under Title VII, the disparate impact theory allows a plaintiff to show that a facially neutral practice or policy of an employer can nevertheless have a disproportionate impact on a protected group.¹⁶⁷ Once the employee has established that such a disparate impact is caused, the burden falls on the employer to establish that the challenged practice is both related to the job and a business necessity.¹⁶⁸ If the employer meets its burden, the employee will still prevail if she can prove pretext or the existence of an alternative employment practice that (1) eliminates the discrimination and (2) was not adopted by the employer.¹⁶⁹

Disparate impact theory was introduced to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."¹⁷⁰ The Court recognized that neutral practices that did serve to maintain a discriminatory status quo were contrary to the intent of Congress, and did not require a showing of intent on the part of the employer.¹⁷¹ Justice O'Connor has suggested that the disparate impact theory is really justified on the grounds that facially neutral practices that have a disparate impact on protected groups are inherently

¹⁶⁶ See, e.g., Alice Dembner, *Northeastern Takes Steps to Hire More Gays*, BOSTON GLOBE, June 28, 1994, at 20 (describing an affirmative action program for gay and lesbian professors at Northeastern University). But see Anthony Flint & Kay Longcope, *Kennedy School Shows Caution on Gay Initiative*, BOSTON GLOBE, Feb. 28, 1991, at 25 (school stated that it did not offer preferential treatment to gays and lesbians despite recommendation of an affirmative action program).

¹⁶⁷ See 42 U.S.C. § 2000e-2(k)(1)(A) (1994). The Supreme Court first recognized that facially neutral practices that have a disparate impact on protected groups were forbidden under Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹⁶⁸ See 42 U.S.C. § 2000e-2(k)(1)(A). *Griggs* required that any practice shown to have a disparate impact must be both related to the job and necessary for the employer. See *Griggs*, 401 U.S. at 431. In 1989, the Court changed the defense by replacing business necessity with reasonable employer justification, and changing the employer's affirmative defense to a mere burden of production. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1990). The Civil Rights Act of 1991 legislatively overruled *Wards Cove* and returned to the affirmative defense set forth in *Griggs*. See 42 U.S.C. § 2000e-2(k)(1)(A).

¹⁶⁹ See 42 U.S.C. § 2000e-2(k)(1)(A).

¹⁷⁰ *Griggs*, 401 U.S. at 431.

¹⁷¹ *Id.* at 432.

discriminatory and are the functional equivalent of intentional discrimination.¹⁷² O'Connor's understanding of disparate impact is that it roots out "hidden" intent.

ENDA explicitly disallows recovery under a "disparate impact" theory of discrimination.¹⁷³ There are two main reasons suggested to justify the absence of disparate impact theory under ENDA, but neither one is compelling. First, it is argued that disparate impact protection is not warranted because homosexuals are more likely to be the victims of outward discrimination, which is actionable under the disparate treatment theory, than involuntary discrimination, which is actionable only under disparate impact theory.¹⁷⁴ While it is undoubtedly true that overt discrimination should be the main target of any non-discrimination statute, disallowing a disparate impact challenge will allow employers to circumvent the law by enacting facially neutral policies that disproportionately affect gays and lesbians. Because one rationale for disparate impact theory is the weeding out of this "hidden" discriminatory intent, it is hard to see why this theory should not be extended to sexual orientation.

Second, there will be great practical difficulties in proving that a policy exerts a disparate impact based on sexual orientation. Because of the difficulties of gathering statistics on the populations of homosexuals inside the workplace and in the general population, plaintiffs would be unable to prove that a given practice has a disproportionate impact on gays and lesbians.¹⁷⁵ Some have suggested that inclusion of a disparate impact theory would require employers to keep track of the number of gays and lesbians who worked for them.¹⁷⁶

One clear instance where the disparate impact theory could be useful would be in challenging employee benefits plans tied to marriage.¹⁷⁷ Given the Defense of Marriage Act and its state counterparts, a practice that differentiates between people because of their marital status must have a disparate impact on homosexuals simply because, regardless of the statistical prevalence of homosexuals in the population or the work force, homosexuals cannot marry.¹⁷⁸ Once the discriminatory effect of such a policy is established, the employer must

¹⁷² *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (plurality).

¹⁷³ S. 1276, 106th Cong. § 4(f) (1999) ("[T]he fact that an employment practice has a disparate impact, as the term 'disparate impact' is used in the Civil Rights Act of 1964 . . . , on the basis of sexual orientation does not establish a prima facie violation of this Act.").

¹⁷⁴ *See, e.g.*, Frank, *supra* note 134.

¹⁷⁵ *See, e.g.*, 142 CONG. REC. S10,054, S10,056 (daily ed. Sept. 9, 1996) (statement of Sen. Kennedy).

¹⁷⁶ This is the major reason given by supporters of ENDA for the exclusion of disparate impact theory. *See, e.g.*, Frank, *supra* note 134.

¹⁷⁷ While ENDA has an exception that explicitly excludes benefit plans, see S. 1276, 106th Cong. § 6 (1999), any policy that depended on marital status would have a similar impact.

¹⁷⁸ There would be no need for actual numbers in such a case, thus negating the second reason given above for not allowing disparate impact under ENDA.

then prove job relatedness and business necessity. It would be difficult for an employer to meet this part of the test.¹⁷⁹ Perhaps the most compelling evidence against the business necessity of forbidding domestic partnership benefits is the number of large companies that have extended benefits to domestic partners.¹⁸⁰

While it might be difficult at present to make the statistical showing needed to support a disparate impact claim based on sexual orientation, this is not to say that it will always be difficult to do so. If policies that seek to eradicate sexual orientation discrimination succeed,¹⁸¹ it may become possible to collect the statistics needed to make a disparate impact challenge based on sexual orientation. Not allowing this theory under ENDA is short-sighted and effectively legitimizes the adoption of facially neutral yet practically discriminatory policies by employers.

3. *Exemption of Religious Organizations*

Perhaps the most discussed issue concerning sexual orientation discrimination laws is their application to religious employers. Because many religions condemn homosexuality as immoral,¹⁸² many feel that application of statutes such as ENDA to religious organizations would violate the organizations' right of Free Exercise as guaranteed by the First Amendment.¹⁸³

Title VII has specific exemptions that allow religious institutions to discriminate—but only on the basis of religion; not race, color, sex, or national origin.¹⁸⁴ These exemptions have been read narrowly under Title VII, and some

¹⁷⁹ See Development in the Law, *supra* note 35, at 1636–37 (noting the difficulty in proving business necessity).

¹⁸⁰ Apple Computer, Levi Strauss, Microsoft, and MCA are only a few examples. See HEWITT ASSOCS., DOMESTIC PARTNERS AND EMPLOYEE BENEFITS 1994, at 20–22.

¹⁸¹ Success of these policies would lead to more openly gay and lesbian employees, and reduce the stigma of homosexuality that keeps people “closeted.”

¹⁸² Many religions (particularly various Protestant denominations) are currently divided on the issue of homosexuality, and particularly on the legitimacy of gay marriage (or church-blessed partnerships). See, e.g., Erik Meers, *Religion: Out for God*, ADVOCATE, Mar. 28, 2000, at 18 (Episcopal church installs gay dean, despite continuing church debate over gays and lesbians). Religious objection to homosexuality is by no means universal, and one can argue that exempting all religions (regardless of their views on homosexuality) from ENDA clearly favors some religious views over others.

¹⁸³ See Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 329–51 (1999) (discussing the Free Exercise concerns implicated by anti-discrimination laws); see generally David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption From Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176 (1994) (discussing the limits of religious autonomy and state authority in this area).

¹⁸⁴ 42 U.S.C. § 2000e-2(e)(1) (1994) (establishing a bona fide occupational qualification (BFOQ) defense for employers to discriminate on the basis of religion); 42 U.S.C. §§ 2000e-1,

religiously affiliated organizations have failed to defend discrimination actions.¹⁸⁵ Organizations that have asserted a religious basis for discriminatory practices have not fared well under other laws either.¹⁸⁶

ENDA does not provide narrow exceptions to religious organizations, but instead exempts all religious organizations from coverage.¹⁸⁷ There is a narrow exception to this exemption, providing that positions solely concerned with “unrelated business taxable income” are subject to ENDA.¹⁸⁸ There is no requirement that a particular sexual orientation be a bona fide occupational qualification (BFOQ);¹⁸⁹ religious organizations are free to discriminate on the basis of sexual orientation unless the position involved is solely involved in for-profit, non-religious activity.¹⁹⁰

ENDA’s exemption of religious organizations clouds Congress’ intent in enacting the statute.¹⁹¹ Title VII is clear—employers, including religious organizations, cannot discriminate unless they do so on the basis of a BFOQ. Under ENDA, employers can discriminate for any reason if they are religious. This sends a mixed message—if Congress really intended to stamp out sexual orientation discrimination, why are religious groups above it? Certainly, there

2000e-2(e)(2) (allowing religious educational institutions and religious schools to discriminate on the basis of religion).

¹⁸⁵ See, e.g., *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 461–65 (9th Cir. 1993) (finding that where the ownership, affiliation, purpose, student body, and curriculum were secular or religiously neutral, a school could not discriminate against teachers on the basis of their religion).

¹⁸⁶ The seminal case in this area is *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). In *Bob Jones*, the Supreme Court held that the government interest in eradicating racial discrimination was compelling and denied a tax exemption to a university that forbade interracial dating. *Id.* at 604.

¹⁸⁷ S. 1276, 106th Cong. § 9(a) (1999). A religious organization is defined as a “religious corporation, association, or society” or an educational institution, if it is either “controlled, managed, owned or supported” by a religious organization or has a “curriculum . . . directed toward the propagation of a religion.” *Id.* § 3(8).

¹⁸⁸ *Id.* § 9(b). Unrelated business taxable income is income that is subject to tax under section 511(a) of the 1986 Internal Revenue Code, codified at 26 U.S.C. § 511(a). S. 1276, 106th Cong. § 9(b) (1999).

¹⁸⁹ One anomaly of ENDA is the absence of a BFOQ defense.

¹⁹⁰ It is unclear exactly what type of position would be “solely” concerned with unrelated business taxable income. If “solely” is read strictly by the courts, it is hard to imagine that any position in a religious organization would be seen as “solely” involved with the non-religious aspects of the organization.

¹⁹¹ Besides this problem, there is also a strong argument that such a religious exemption violates the Establishment Clause. See G. Sidney Buchanan, *The Power of Government to Regulate Class Discrimination by Religious Entities: A Study in Conflicting Values*, 43 EMORY L.J. 1189, 1228–29 (1994) (arguing that allowing religious organizations to discriminate on grounds other than religion, where secular employers cannot, may violate the Establishment Clause).

may be First Amendment concerns implicated, but these concerns would also be implicated under Title VII.¹⁹² By excusing religious organizations from following ENDA, Congress seems to suggest that it doesn't want to tell a religion that it's wrong about sexual orientation. But the courts and Congress have had no trouble telling religious organizations that discriminate on the basis of race that they are violating public policy. Given this discrepancy, how can one not view sexual orientation as a second-rate protected class in employment discrimination?¹⁹³

B. *Interpretive Problems*

Beyond the specific differences in protection between ENDA and Title VII, it is possible, and indeed likely, that courts interpreting ENDA would find that it, as stand-alone legislation, is sufficiently different from Title VII so that it could be interpreted differently. While the ADEA and ADA are both set up on the same basic framework as Title VII, the courts have not hesitated to read these separate statutes quite differently from Title VII. For example, it is unclear whether disparate impact theory, which is clearly recognized under Title VII, is available under the ADEA.¹⁹⁴ Also, the terms "reasonable accommodation" and "undue

¹⁹² Title VII allows religious organizations to discriminate on the basis of religion, and thus respects the potential Free Exercise claims of these organizations. While such treatment is constitutionally permissible, it is not constitutionally mandated—except perhaps in the case of "religious function" employees. See Buchanan, *supra* note 191, at 1231. Under the Supreme Court's current formulation of the Free Exercise Clause, entities cannot be exempted from the reach of a generally applicable (i.e., not targeted at religion) law. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (no religious exemption granted to a generally applicable law criminalizing the use of peyote). The *Smith* standard suggests that neither ENDA nor Title VII need contain a religious exemption of any kind to be in harmony with the First Amendment.

¹⁹³ For an in-depth discussion of the equivalence of sexual orientation with race and sex, see generally Battaglia, *supra* note 183, at 356–62. Bill Bradley supported amending Title VII because it "would clearly indicate . . . that discrimination against gay people is every bit as serious as discrimination against other protected groups." Michael Kranish, *Bradley Leads, Gore Follows in Trumpeting Gay Rights*, NEW ORLEANS TIMES-PICAYUNE, Nov. 25, 1999, at 16A.

¹⁹⁴ The Supreme Court has never ruled on this issue, though two Justices have noted that the question is unsettled. *Markham v. Geller*, 451 U.S. 945, 948 (1981) (Rehnquist, J., dissenting from denial of certiorari) ("This Court has never held that proof of discriminatory impact can establish a violation of the ADEA. . ."); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 618 (1993) (Kennedy, J., concurring) (citing *Markham* for the same proposition). See generally Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507 (asserting that the controversy is fundamentally a policy dispute over the definition of age discrimination and the appropriate scope of the ADEA).

hardship” used in both Title VII and the ADA, have been read very differently in the two statutes.¹⁹⁵

The problem of addressing sexual orientation in stand-alone legislation as opposed to a comprehensive employment discrimination statute is currently being litigated by the Lambda Legal Defense Fund in California.¹⁹⁶ California offered protection to gay and lesbian employees under its Labor Code, in a provision separate from the statute governing other types of employment discrimination.¹⁹⁷ In this case, *Murray v. Oceanside Unified School District*, the plaintiff is a school teacher.¹⁹⁸ She alleged she was denied a promotion and suffered sexual-orientation harassment because she was a lesbian.¹⁹⁹ The trial court dismissed the case, in part by finding that the non-discrimination statute covered only the hiring, firing, and promotion of an employee.²⁰⁰ While harassment was recognized under the general anti-discrimination statute,²⁰¹ the court held that California’s sexual-orientation discrimination statute did not support a harassment claim.²⁰²

¹⁹⁵ In Title VII, employers have a duty to “reasonably accommodate” the religious observance and practice of employees unless the accommodation entails “undue hardship.” 42 U.S.C. § 2000(j) (1994). Anything more than a de minimis cost is seen as an undue hardship in this context. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). The ADA also requires that employers reasonably accommodate disabled employees in the absence of undue hardship. ADA § 12112(b)(5) (1994). “Undue hardship” under the ADA is defined as “significant difficulty or expense,” to be determined by considering all relevant factors. 29 C.F.R. § 1630.2(p) (1999).

¹⁹⁶ The case, *Murray v. Oceanside Unified School District*, is set for oral argument before the California Court of Appeals in March, 2000. Lambda Legal Defense and Education Fund, *Cases: Murray v. Oceanside Unified School Dist.*, at <http://www.lambdalegal.org/cgi-bin/pages/cases/record?record=85> (last modified Sept. 1, 2000) (on file with the Ohio State Law Journal).

¹⁹⁷ California now includes sexual orientation in its general anti-discrimination protection. See CAL. GOV’T CODE § 12940(a) (West Supp. 2000) (forbidding discrimination on the basis of “race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation”). This lawsuit was, however, filed under an earlier law. See CAL. LAB. CODE § 1102.1 (1997), *repealed* 1999 (forbidding discrimination on the basis of sexual orientation only).

¹⁹⁸ *Murray*, at <http://www.lambdalegal.org/cgi-bin/pages/cases/record?record=85> (last modified September 1, 2000) (on file with the Ohio State Law Journal).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* The court also found against the plaintiff because she failed to file notice under the state Tort Claims Act and thus failed to preserve the sexual-orientation discrimination claim against the school district, and also found that her claims for intentional infliction of emotional distress were precluded by the state’s workers’ compensation statute. *Id.*

²⁰¹ CAL. GOV’T CODE § 12940(h) (West 1992).

²⁰² *Id.* As sexual orientation is now included in California’s general anti-discrimination provision, it would now be impossible for the California court to use this reasoning. Sexual orientation harassment is now explicitly prohibited in California. CAL. GOV’T CODE § 12940(h)(1) (West Supp. 2000).

Murray points out the problem with stand-alone legislation. This case suggests that federal courts interpreting ENDA will not necessarily recognize the same legal theories that have been developed under Title VII. Like ENDA, the California statute at issue in *Murray* was separate from the general anti-discrimination statute. ENDA does not explicitly address harassment, and it is therefore possible that sexual orientation harassment will not be punishable under it.

There are other interpretive theories developed under Title VII that should be extended to sexual orientation, as well. Besides harassment, courts interpreting Title VII have almost uniformly denied finding that an employer's rationale of "customer preference" to justify discrimination is not a legitimate, non-discriminatory reason or a BFOQ.²⁰³ It is by no means clear that customer preference will be recognized as an invalid defense under ENDA. For example, take a hypothetical employer whose customers are predominantly religious organizations. Given ENDA's exception that allows religious organizations to discriminate on the basis on sexual orientation, it is easy to see why courts might have a difficult time forbidding this employer from sexual orientation discrimination.

Addressing sexual orientation discrimination in ENDA and not in Title VII will only serve to highlight the differences between sexual orientation discrimination and discrimination based on race, color, sex, or national origin.²⁰⁴ Given the reluctance of federal courts to afford protection to homosexuals in employment under Title VII,²⁰⁵ it is logical to assume that ENDA will not be read as expansively as Title VII, and the protection offered to gays and lesbians will be limited. The numerous exceptions to ENDA discussed above may also be used by courts to find that Congress did not intend for ENDA's protection to be as far-reaching as Title VII's.

²⁰³ The seminal case denying customer preference is *Diaz v. Pan American World Airlines, Inc.*, 442 F.2d 385 (5th Cir. 1971). In *Diaz*, Pan American defended its practice of hiring only female flight attendants by claiming that its customers preferred them to males. *Id.* at 387. The court rejected this BFOQ claim, finding that "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid." *Id.* at 389. See also *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (rejecting argument that Latin American customers' preferences for male representatives established a BFOQ for sex discrimination).

²⁰⁴ As noted in the discussion of the *Dale* case, *supra* Part II.B.3, the Supreme Court has already shown some reluctance to treat sexual orientation discrimination the same as other types of discrimination when free association rights are at issue. The "moral" implications of homosexuality seem to ensure that it could be treated differently even under comprehensive anti-discrimination laws.

²⁰⁵ See *supra* Part II.B.1.

IV. CONCLUSION

While local and state governments have taken steps to eradicate employment discrimination based on sexual orientation, it is clear that a federal law is needed to address this continuing problem in some uniform, principled manner. Attempts to extend the protection of Title VII to cover sexual orientation have met with no success in the courts, and equal protection analysis is similarly limited. It is clear that federal legislation is needed to address this problem, and Congress has proposed ENDA.

ENDA might be more politically palatable to some than an amendment to Title VII, but given the federal courts' hostility to sexual orientation claims and the failures to extend all Title VII protections to the stand-alone protection offered by the ADEA, it is virtually certain that the protection offered by ENDA will fall far below that offered under Title VII. It is unclear whether theories such as harassment and customer preference will be applied to sexual orientation discrimination; and the numerous exceptions built into ENDA ensure that its scope will be limited. If the intent of Congress is to protect sexual orientation like Title VII protects race, color, sex, religion, and national origin, ENDA is not the solution.

